# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CLYDE E. POTTS,

Defendant-Appellee.

UNPUBLISHED
November 27, 2001

No. 232177
Wayne Circuit Court
LC No. 99-012643

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

The prosecution appeals as of right from the circuit court's order granting defendant's motion to suppress evidence and dismissing the charges against defendant. Defendant was charged with carrying a concealed weapon, MCL 750.227, possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), possession of methylenedioxymethamphetamine, MCL 33.7403(2)(b), and possession of a firearm during the commission of a felony, MCL 750.227b. We reverse and remand.

At the hearing on defendant's motion to suppress, Southgate Police Officer Scott Hayes testified that at approximately 12:55 a.m. on September 11, 1999, he observed a crowd of about thirty to thirty-five people in front of Wild Woody's, a restaurant and bar located at the border of Lincoln Park and Southgate, that appeared to be hostile and possibly starting a fight. Hayes noted that the location was "prone to fights," and that he told dispatch to notify Lincoln Park police of the situation. As Hayes attempted to disperse the crowd, a citizen pointed at defendant, who was walking away from the crowd with a female companion, and indicated to Hayes that defendant had a gun. Hayes testified that defendant was too far away for him "to do anything," so he pointed out defendant to two Lincoln Park officers at the scene, Paul Cochran and Dan Smith, and yelled to them that defendant "might be armed."

Cochran testified that he and Smith were dispatched to Wild Woody's where, they were told, there was "a large fight." After Hayes alerted them that defendant may have a weapon, Cochran and Smith followed defendant who, with his companion, was walking at a fast pace, until he stopped at a car. As defendant and his companion were getting into the car, Cochran and Smith pulled their patrol car behind the car that defendant had entered. The officers told defendant to get out of the car with his hands visible. As defendant was getting out of the car, he stated that he was carrying a gun. After Cochran removed the gun from the waistband of defendant's pants and began to frisk defendant, defendant indicated that he had a packet of

cocaine and some "speed" in a candy container in his upper front pocket. Cochran removed a container holding cocaine and methylendioxymethamphetamine from defendant's pocket.

In making its findings following the evidentiary hearing, the circuit court stated that the person who pointed out defendant to Hayes told Hayes that defendant "may have a gun," and that when Cochran and Smith stopped defendant, he was "in effect under arrest at that point." The court found that the officers did not have probable cause to arrest defendant because they had no reason to believe that the information they received regarding defendant's possession of a gun was reliable. Hayes never inquired of the informant the basis for his assertion concerning defendant's possession of a gun, and the language "he may have a gun" indicated that his assertion may be based on rumor.

On appeal, the prosecution argues that the circuit court erred in finding that defendant was under arrest and in applying the probable cause standard to the officers' stop of defendant rather than the reasonable suspicion standard required for an investigatory stop. The prosecution further contends that the officers had the requisite reasonable suspicion to stop defendant. In reviewing a trial court's decision regarding a motion to suppress evidence, this Court reviews the trial court's factual findings to determine if they are clearly erroneous and reviews conclusions of law de novo. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "The Fourth Amendment applies to all seizures of persons, including seizures that involve only a brief detention, short of traditional arrest." *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985). A "seizure" occurs within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). A suspect may be detained with reasonable suspicion pursuant to an investigatory stop as long as police are diligently pursuing a means of investigation that is likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain the suspect. *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992).

Here, the record shows that the police stopped defendant to determine if he was armed. They pulled their patrol car behind defendant's vehicle and told him to get out of the vehicle with his hands visible. Although Cochran testified that defendant was not free to leave, the officers' seizure of defendant was only an investigatory stop at this point. The police did not need probable cause to detain and frisk defendant for weapons and do what was necessary to dispel their suspicions that he was engaged in criminal activity. *Chambers, supra*. The trial court clearly erred in finding that the officers' stop of defendant began as an arrest that required probable cause; rather, the officers' stop of defendant began as an investigatory stop, which only required reasonable suspicion.

Next, the prosecution argues that the officers had the requisite reasonable suspicion to make the investigatory stop of defendant. We agree. The Michigan Supreme Court recently reiterated the requirements for police to make a valid investigatory stop:

> The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a "reasonably articulable suspicion" that the person is engaging in criminal activity. The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." [*People v Oliver,* 464 Mich 184, 192; 627 NW2d 297 (2001), quoting *People v LoCicero,* 453 Mich 496, 501-502; 556 NW2d 498 (1996).]

Further, the determination whether the police had reasonable suspicion to support an investigatory stop is made considering the totality of the circumstances "as understood and interpreted by law enforcement officers, not legal scholars . . . ." *Oliver, supra,* quoting *People v Nelson,* 443 Mich 626, 632; 505 NW2d 266 (1993).

"With regard to the issue whether an anonymous tip supports a reasonable suspicion to stop a suspect, Michigan case law tracks federal precedent." *Faucett, supra* at 163. Reasonable suspicion may be based on an anonymous tip if, under the totality of the circumstances, the tip carries with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity. *Id.* at 169. In determining whether the information from a citizen-informant carries enough indicia of reliability to provide the officers with a reasonable suspicion that criminal activity is afoot, three related factors are examined: (1) the reliability of the particular informant; (2) the nature of the particular information given to the police; and (3) the reasonableness of the suspicion in light of the first two factors. *People v Tooks,* 403 Mich 568, 577; 271 NW2d 503 (1978).

In *Tooks, supra,* an unidentified citizen informed police officers that he saw a man showing a gun to two other men. *Id.* at 573. He described the man he saw with the gun, as well as the two to whom the man showed the gun. *Id.* at 574. The informant refused to identify himself because of fear of area gangs. *Id.* The Michigan Supreme Court rejected the defendant's argument that because the informant was not known to the police and would not identify himself, the information supplied was not reliable or credible. *Id.* at 577. The Court stated that

> information provided to law enforcement officers by concerned citizens who have personally observed suspicious behavior is entitled to a finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable period of time by the officers' own observations. [*Id*.]

In *Florida v J.L.,* 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000), an anonymous telephone informant reported to the police "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id.* at 268. Officers responded to the call and found the respondent at the specified bus stop, wearing a plaid shirt. *Id.* The officers frisked the respondent and found and seized a gun from his pocket. *Id.* The Florida Supreme Court found the search invalid under the Fourth Amendment. *Id.* at 269. In affirming that decision, the United States Supreme Court found that the tip concerning the respondent lacked sufficient indicia of reliability because "[a]ll the police had to go on in this case was the bare report of an

unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." *Id.* at 271.

In *United States v Valentine,* 232 F3d 350 (CA 3, 2000), on which the prosecution relies, officers were patrolling an area known for "[a] lot of shootings." *Id.* at 352. A citizen "flagged them down and explained that he had just seen a man with a gun." *Id.* The informant described the gunman, but refused to identify himself. *Id.* A short distance away, the officers encountered the defendant, who matched the informant's description, along with two other men. *Id.* at 353. All three began walking away when the patrol car arrived. *Id.* The officers approached the defendant and one of them asked the defendant to come over and place his hands on the squad car. *Id.* The defendant charged the officer, and as the two scuffled, the defendant's handgun fell to the ground. *Id.*

In finding that the circumstances in *Valentine* supported the reliability of the tip, the *Valentine* court distinguished its case from *J.L.* on the bases that "the officers in [*Valentine*] knew that the informant was reporting what he had observed moments ago, not what he learned from stale or second-hand sources," and that "the officers [in *Valentine*] had more reason to believe that the informant was credible than the officers did in *J.L.*, for a tip given face to face is more reliable than an anonymous telephone call." *Id.* at 354. Considering the totality of the circumstances, the court concluded that "the officers had reasonable suspicion after they received the face-to-face tip, were in a high-crime area at 1:00 a.m., and saw Valentine and his two companions walk away as soon as they noticed the police car." *Id.* at 357.

We conclude that in the instant case, the officers had reasonable suspicion to conduct an investigatory stop of defendant. With regard to the reliability of the informant in this case, defendant contends that because the informant was not known to the officers and did not identify himself, he could not considered reliable. However, as the prosecution notes, the informant did make a face-to-face report, which allowed the police to assess his credibility and demeanor. *Valentine, supra* at 354. The informant also relayed the information in the presence of the person he identified as carrying a weapon, thereby exposing himself to possible retaliation and making it less likely that he would lie. *Id.* Thus, while the informant was not known to Hayes and did not identify himself, neither was he the unaccountable telephone informant that provided the tip in *J.L.* We conclude that because the informant made a face-to-face report at the scene and in the presence of the person he identified as carrying a weapon, he could be considered reliable.

With regard to the nature of the information provided, we note first that to the extent that the circuit court found that the informant told Hayes that defendant "may have a gun," that finding is not supported by the record and is, therefore, clearly erroneous. Although the exact words used by the informant are not part of the record, the record does show that the prosecutor asked Hayes, "[W]hat was the nature of the information that you received?" and Hayes responded, "That the -- that the gentleman, that's seated at the Defendant table, had a gun." The record also shows, however, that on the basis of the informant's tip, Hayes relayed information to Cochran and Smith that defendant *may* be armed.

In any event, Defendant contends that the informant's tip was not reliable because unlike the informants in *Tooks* and *Valentine,* the informant in this case did not indicate that he personally observed a gun in defendant's possession. We note, however, that neither was the tip

the "bare report" provided in *J.L.*; rather, as in *Valentine*, the circumstances surrounding the informant's tip in this case provided a "broader context" within which the police assessed the information that defendant may be armed. *Valentine, supra* at 356. Here, the person identified as possibly being armed was part of a crowd described as "hostile" that had gathered at nearly 1:00 a.m. in the morning at a location known for fights, and that person was walking "at a fast pace" toward his car when he was identified.

> An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. [*Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000); citations omitted.]

Further, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Id.* Certainly, there could be innocent explanations for defendant's presence in the crowd outside the bar and his rapid walk to his vehicle, and such behavior is not necessarily indicative of ongoing criminal activity. However, such behavior is part of the "totality of the circumstances" that officers may consider when assessing whether they have reasonable suspicion that a person is involved in criminal activity. See *Wardlow, supra* at 125; *Terry, supra* at 22; *Oliver, supra* at 8.

Although it is not clear whether the unidentified informant in this case personally viewed defendant's gun, we conclude that the informant's face-to-face report that defendant had a gun, when considered under the totality of the circumstances in this case, provided the officers with reasonable suspicion that defendant was engaging in criminal activity. *Oliver, supra* at 192; see also *Tooks, supra* at 580-581. Accordingly, the circuit court erred in granting defendant's motion to suppress the evidence obtained during the officers' investigatory stop of defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen